No. 2439

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy of the Estate of FRANK M. PINDEL, Bankrupt, and the BANK OF NEZ PERCE,

Respondents.

In the Matter of FRANK M. PINDEL,

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Petition for Revision and Transcript of Record

In Support Thereof Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, Certain Orders of the United States District Court for the Central District of Idaho.

Filmer Bros. Co., Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

[Petition for Revision.]

In the United States Court of Appeals for Ninth Circuit.

In the Matter of the Bankruptcy of FRANK M. PINDEL,

A Bankrupt.

PETITION FOR REVIEW BY BANKRUPT.

To the Honorable, The Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The bankrupt respectfully represents that he petitions under section 24 of the 1898 Bankruptcy Act for review to have the Court superintend and revise "in matter of law" the decision and orders of the Honorable United States District Court for the District of Idaho, Central Division, rendered, entered and made on petitions to review, supervise and revise decision and orders of the Honorable Referee, G. Orr McMinimy, in the matter of the bankruptcy of your petitioner, which said decisions and orders of the said Honorable United States District Court, and of the said Honorable Referee, and the petitions of the Bank of Nez Perce, of Mr. Finis Bently, and of the trustee, are hereto attached and made a part hereof.

And for the purpose of having the said decision and orders of the said Honorable United States District Court reviewed, revised and corrected and the proceeding in bankruptcy superintended, in matter of law, your petitioner respectfully represents and assigns that the Honorable United

States District Court erred in matter of law as follows, to wit:

FIRST: Erred (a) in holding, in effect, that the bankrupt is estopped by the matters named in the decision or opinion of the Honorable United States District Court to object to the allowance of the claim of the Bank of Nez Perce against his estate, and therefore, estopped to prove the matters and facts found by the Honorable Referee, and to have relief because thereof against the claim of the said Bank of Nez Perce; (b) erred in holding, in effect, that bankrupt is estopped to allege and prove payment or satisfaction of judgment of the Bank of Nez Perce under that rule of law which holds that where more than sufficient personal property has been seized on valid process of law and it has been so wasted, destroyed, or damaged by the sheriff, keeping it under such valid process, that the judgment debtor is deprived of the benefit of his said property, that it is conclusively presumed that the judgment is satisfied, or paid, to the extent of the value of the property so seized for payment of the judgment.

SECOND: Erred (a) in holding, in effect, that the bankrupt had not the right to urge and claim that the Bank of Nez Perce's claim, or judgment is paid in full, or to the extent of the property destroyed and wasted by the sheriff; erred (b) in holding, in effect, that the Honorable Referee had no right as matter of law upon the facts found by him to decide that the said bank's judgment is paid and satisfied in full; erred (c) in holding that the

bankrupt had no setoff, or counterclaim, within the meaning of the Bankruptcy Act of 1898 of Congress.

THIRD: Erred (a) in holding, in effect, that section 4185 of the Revised Codes of Idaho prevented the bankrupt from claiming and proving in the bankruptcy proceeding that the judgment of the Bank of Nez Perce was paid and satisfied to the extent of the property's value seized under lawful process by the sheriff in the case pending in the State court wherein the said judgment was recovered and entered on account of waste, destruction of, and damage to such property; erred (b) in holding, in effect, that section 4185 of the Revised Codes of Idaho prevented the bankrupt from claiming a setoff or counterclaim, or cross-demand in the bankruptcy proceeding for the value of the property sold at the void execution sale on the 6th of April, 1909; erred (c) in holding that section 4185 of the Revised Codes of Idaho bars, or extinguishes, the bankrupt's demand, or cross-demand, or setoff, or counterclaim, or whatever it may be called, accruing on the first and unlawful attachment which was dissolved by the State court in the original proceedings; erred in holding, in effect, that the case of Willman vs. Friedman, 4 Idaho, 209, decides that the bankrupt had to have the question of the Bank of Nez Perce's liability because of the first and unlawful attachment tried, adjusted and settled in the original case wherein the judgment was entered, and that if not so tried, presented and adjudicated, section 4185 of the Revised Codes of Idaho merged it in that judgment or extinguishes it so that it cannot form

the basis of relief in the bankruptcy proceeding, and cannot now be assigned by the bankrupt as ground or reason for wiping out the judgment of the Bank of Nez Perce, or as a reason for disallowing that judgment as a claim against his estate; erred (d) in holding that section 4055 of the Revised Codes of Idaho bars the right of the Bank of Nez Perce to sue the sheriff, and, because it does, in effect, prevents the bankrupt from now urging that the bank's judgment must not now be allowed against his estate nor paid out of his estate; (e), in so holding that Honorable United States District Court overlooks the fact that no statute bars a debtor's right to prove that a judgment against him has been paid and the further fact that the right of the debtor to prove that a judgment against him has been paid through waste and destruction of his property, or damage to it, by a sheriff who has held it under lawful and valid process does not depend upon the right of the judgment creditor to recover from the sheriff, but the right to have the benefit of such payment exists in cases where the judgment debtor because of his own fault cannot recover against the sheriff as well as in cases where the judgment creditor can recover from the sheriff, and by overlooking these rules of law, the court erred, and reached a wrong conclusion of law as to the judgment creditor's right to recover against the sheriff having anything to do with the judgment debtor's right to have the benefit of his property as against the judgment creditor.

FOURTH: Erred (a) in holding, in effect, that the bankrupt could not have the decision that the

judgment of the Bank of Nez Perce be not allowed and paid out of his estate because the matters and things found by the Honorable Referee were unliquidated damages not provable against the bankrupt's estate if held by the Bank of Nez Perce, or some other person against the bankrupt, and in passing the bankrupt states that the petition of the Bank of Nez Perce presents no such question of law for review; and (b) this holding is entirely erroneous for it omits the fact that bankrupt in proving and claiming payment of the judgment, which payment was found as a fact by the referee under the rule of waste is not proving a setoff, or a counterclaim, or a demand, or a cross-demand, against the Bank of Nez Perce, but is merely proving and establishing satisfaction and payment of the judgment held by the Bank of Nez Perce; erred (c) in holding that the damages because of the first and unlawful attachment cannot be adjusted and adjudicated in the controversy over the allowance of the judgment of the Bank of Nez Perce as a claim against bankrupt's estate to be paid out of his estate; erred (d) in holding that there are not sufficient facts found by the Referee, or sufficient evidence, to authorize damages; for the Referee found that the value of the property seized on the first attachment at the time it was seized was of the value of $6,522.00, and as for conversion the measure of damages is the value of the property at or near the seizure on the unlawful attachment.

FIFTH: Erred in failing to order a credit for the sum of $57.00, or the exact purchase price of the

five hogs sold to Dan Morgan under the agreement of July 10th, 1908, at private sale, which has never been credited as a payment on the judgment of the Bank of Nez Perce.

SIXTH: Erred (a) in reversing the order of the Honorable Referee, disallowing the claim of the Bank of Nez Perce; erred (b) in allowing the claim of the Bank of Nez Perce in the sum it did so allow it against the bankrupt's estate; erred (c) in allowing the claim of the bank of Nez Perce in any sum whatever; erred (d) in the conclusions of law which has resulted in the allowance of the claim of the Bank of Nez Perce against the Bankrupt's estate.

SEVENTH: Erred in holding in effect that the claim of the Bank of Nez Perce was placed beyond objection or contest by the proceeding heretofore had before the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth District, originating on the trustee's petition to sell personal property and the bankrupt's homestead, which was being heard by the Honorable Referee, and removed from him by intervention of the bankrupt's wife; erred in holding, in effect, that the bankrupt by failing to make statement of the reasons he claims the Bank of Nez Perce's judgment is satisfied and paid when he first filed his schedules, and by failing to list them on the schedule for statement of setoffs and counterclaims, committed fraud on the bankruptcy court to such an extent that he is now estopped to show and prove the truth and the undisputed facts found by the Referee; for the schedules and petition show that

the bankrupt was a bankrupt even though the bankruptcy proceedings subsequently establish that there was an adjustment to be made as to the judgment of the Bank of Nez Perce, since the homestead is valued at not more than $5,000.00 and claimed as exempt and no other property is scheduled when the schedules were first filed, and, therefore, these schedules show that the bankrupt had no property beyond the exemptions to pay the indebtedness which he admits he honestly owes, and furthermore, the bankrupt had an undoubted right to transfer the question of the adjustment of all matters between him and the Bank of Nez Perce to bankruptcy Court for adjustment and decision, and to have them decided upon the proceedings looking to the allowance of the judgment of the Bank of Nez Perce against his estate; furthermore, the bankrupt had a right to amend his schedules, and he had a right to object to the allowance of the claim of the Bank of Nez Perce, since the mere scheduling of the judgment does not allow the claim, or estop him from contesting the claim upon its being filed against his estate; in all courts the right to amend pleadings is recognized and enforced at any time before trial, at least, and even recognized at the trial; furthermore, the bankrupt was not bound by the law to schedule the judgment as paid, since it required a judgment of the Court to establish that it was paid in the way he claims it has been paid and satisfied; furthermore, the claim of the Bank of Nez Perce and the defenses against it were not before the Court, and in the proceedings, looking to an order of sale of a bankrupt's property, the

claims against the estate are not tried and allowed, and there is nothing which can prevent a contest against any claim which was not allowed at the time of the order of sale; it is not the law that the bankrupt only has a right to contest claims in the proceedings for an order of sale of his estate; the homestead has increased in value so largely that it will pay his exemption and all the expenses of administration and all claims even if the claim of the Bank of Nez Perce be allowed in the amount ordered by the Honorable District Judge, but this fact cannot justly deprive the bankrupt of defending his estate against the claim of the bank of Nez Perce; the Bank of Nez Perce is not injured by being held to strict account for the things it has done which are wrongful and for the acts of the sheriff; nothing can give the Bank of Nez Perce the right to have its judgment paid twice by the bankrupt; such a thing is devoid of all justice.

EIGHTH: The Court erred in confirming the sale made by the trustee to Orvil M. Collins.

NINTH: Erred (a) in reversing and setting aside Referee's order, refusing to confirm said sale; (b) erred in holding that the terms of the order and notice of sale were not so different as to avoid the sale; erred in holding that no further notice was necessary; erred in holding that Mrs. Pindel was not entitled to further notice; erred in holding that waivers of creditors filed on the trial of objections to sale cured the want of notice.

TENTH: Erred (a) in not passing on the question of the expenses of the trustee and the matters

presented by the trustee's petition for review of the order of Referee allowing attorney's fees and expenses and commissions of the trustee; for the bankrupt had a right to know the exact amount of money he should pay to the trustee to redeem his estate from bankruptcy administration, and if every person was paid all that is justly due them, they can have no objection to the bankrupt redeeming his estate from bankruptcy administration; (c), these matters should not have been left open by the Court as matters for future litigation and controversy and consumption of bankrupt's equity in his homestead; he should not be forced to pay to the trustee to redeem his estate from bankruptcy administration more than is justly due to all his creditors and for expenses of administration, and, if the Referee's order is right as to the amount of expenses of administration up to the hearing before him, it cannot require $5,500.00 and interest thereon to pay claim of Bank of Nez Perce, the other claims, and all the expenses, even though the claim of the Bank of Nez Perce be allowed in the sum ordered by the United States District Court; the bankrupt desires to pay all his debts, since the great increase in the value of his property has made him able so to do, and the Referee adjusted all his obligations with the view of permitting him to pay the exact amount against his estate, legally and lawfully.

ELEVENTH: Erred (a) in failing to pass on the question of the validity of the execution sale made on the 6th of April, 1909, by Harry Lydon—

an ex-sheriff—on an execution issued after he—Harry Lydon— ceased to be the sheriff of Nez Perce County; erred (b) in holding that there was no agreement or understanding between Mrs. Pindel and the Bank of Nez Perce made on the 10th of July, 1908, for sale of attached property at private sale and application of proceeds to payment of debt; the petition of the Bank of Nez Perce does not raise any question as to this agreement not having been made; (c) erred in not noticing that the letter which is Exhibit 19 of the Bank of Nez Perce is a mere memorandum of an agreement which had already been entered into personally with Mr. O'Neil and with Mr. Dowd over the phone, which Mrs. Pindel attempted to make at the suggestion of Mr. O'Neil of the terms of the agreement; the letter is not the agreement; it is merely evidence of the agreement or arrangement; the agreement is set out in Mrs. Pindel's testimony and it is not denied by Dowd or by O'Neil, and five hogs under it were sold to Dan Morgan, and the sale of a small team for $450.00 prevented by Mr. Dowd, and thereafter Mrs. Pindel employed Mr. I. N. Smith, and attempted to defend her property—all of which facts are found by the Referee and not called into question by the petition for review of the Bank of Nez Perce; the bankrupt requests the Court to carefully read the testimony of Mr. O'Neil as to this July, 1908, agreement and especially of how Mr. Dowd violated the agreement as found by the Referee, and it will be seen how the breach of this July agreement by the Bank of Nez Perce injured the bankrupt and resulted in all

the litigation which followed and all the damages being done; this agreement did not exist at the commencement of the action in the State court nor was it breached at the time of the commencement of the action, so, therefore, it cannot be within sections 4184 and 4185 of the Revised Codes of Idaho.

TWELFTH: Erred in deciding questions not presented by the petition for review of the decision and orders of the Honorable Referee, and especially not presented by the petition of the Bank of Nez Perce; erred in deciding against the bankrupt on technicalities which have absolutely defeated justice and set aside all equity, and upon matters that have absolutely no principles of estoppel, and which in no way has injured the Bank of Nez Perce, and have taken nothing from it or has not caused it to lose anything whatever, and which have placed it in no worse or different position than its own acts and the acts of the sheriff for which it is responsible put it.

A certified transcript of the decisions, orders, and petitions herein mentioned and other matters, papers, and evidence, necessary for the consideration and decision of the errors herein assigned, has been ordered, and the Clerk of the United States District Court of Idaho, as soon as possible, will certify such transcript, matters, evidence and proceedings to the Clerk of the Honorable United States Court of Appeals for the Ninth Circuit. And your petitioner respectfully requests that an order be made and entered, directing the manner and time of the service of this petition for review upon the Bank of Nez

Perce, upon Mr. Finis Bently, and upon the trustee in bankruptcy of the bankrupt's estate.

FRANK M. PINDEL,
The Bankrupt.
BEN. F. TWEEDY,
Attorney for the Bankrupt.
Postoffice Address and Residence, Lewiston, Idaho.

State of Idaho,
County of Lewis,—ss.

The undersigned bankrupt makes solemn oath that he is the bankrupt mentioned in the foregoing petition, and that the statements therein contained are true, according to the best of his knowledge, information and belief, and that the review is sought in good faith, and his attorney informs him that, in his judgment and belief, the errors assigned have merit and are well taken, and affiant says that the aforesaid review is not sought for delay, but that the proceeding for review is in good faith and for the sole purpose of having error of law corrected, which error of law is prejudicial to him.

FRANK M. PINDEL.

Subscribed and sworn to before me this 16th day of June, 1914.

[Seal] G. ORR McMINIMY,
Notary Public in and for County of Lewis, and State of Idaho, Residing at ———, Lewis County, Idaho.

In the District Court of the United States for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,

Bankrupt.

Opinion [Relative to Account of Trustee].

MEMORANDUM RELATIVE TO ACCOUNT OF TRUSTEE.

June 11, 1914.

DIETRICH, District Judge:

There was submitted together with the claim of the Bank of Nez Perce and the question of the sale of the real estate an informal account of the trustee for moneys disbursed. The theory upon which this account seems to have been presented was that if the bankrupt could be advised of the total amount of the valid claims against the estate, including expenses of administration, he might be able to procure the funds with which to pay all of the indebtedness, and thus avoid the necessity of selling the land constituting the homestead. My first impression was that possibly I could with propriety pass upon the validity of the several items, but upon reflection I have reached the conclusion that the account ought to be presented in a formal way, and an opportunity given to creditors to object thereto. As is said in Collier on Bankruptcy (9th ed.), at page 664, in speaking of trustees' accounts, "Accounts are usually submitted to creditors at meetings called for that purpose, and if passed by them are approved." I have therefore decided to reverse the

order of the referee, without prejudice to a consideration of the trustee's account when the same is formally presented and a hearing relative thereto brought on in the regular way. In order that there may be no misunderstanding, it is proper to say at this time that the claim of the trustee for reimbursement for expenses incurred by him cannot be made a charge upon the $5,000.00 exemption of the bankrupt. Such claims of the trustee as may ultimately be held to be valid are charges only against the estate, and the exempt property is no part of the estate, and is not subject to administration.

It should further be added that the trustee's accounts have no necessary relation to his right, such as he may have, to recover from the bankrupt and his wife expenses of litigation to which they have been unsuccessful parties. A trustee's account involves a relation only between the trustee and the estate, and not between the trustee and third parties. If the trustee has properly paid out any money on account of litigation upon behalf of the trust estate, he is entitled to reimbursement, even though the estate may not be entitled to recover the amount of such disbursement from the other party to the litigation. It seems that in the Circuit Court of Appeals, in the matter that was taken there for review, the trustee was awarded costs to the amount of $285.70. If he paid out this amount of money on account of such litigation, he is entitled to reimbursement from the estate for the amount thereof, and in turn, as trustee of the estate, he is entitled to recover that amount from the unsuccessful parties

to the litigation, provided they have property subject to process. Their exempt property is, of course, not subject to process. Because of some apparent confusion, I desire to emphasize the fact that in his relation to other parties to litigation, the trustee stands like any other litigant. If he is successful and is awarded the costs, he may recover such costs for the benefit of the estate, but in all proper litigation in which the trustee is involved, as trustee of the estate, he is entitled to be reimbursed from the estate for his expenses reasonably incurred, whether he be successful or unsuccessful; and, of course, as to third parties he is subject to the same limitations, and must comply with the law and the rules the same as any other litigant, if he would recover from them the costs of suit.

Apparently there is no money in the hands of the trustee, and indeed there has been very little money with which to pay expenses. It is to be inferred that the Bank of Nez Perce, the largest creditor, has advanced some money for expense of litigation, etc. To what extent, if at all, the trustee can make claim for reimbursement on account of such expenditures is left for future consideration; that is to say, the trustee may present his accounts, and the whole matter,—what amount can properly be allowed, and upon account of what expenditure,—is left for the consideration, first, of the creditors, and thereafter of the referee, and thereafter, if any party is dissatisfied, of the Court, upon petition for review. It is, of course, desirable that no unnecessary expense be incurred in a hearing upon the justness or validity

of such claims as may be presented by the trustee, and in so far as the evidence already taken is pertinent and material, the parties to any controversy can doubtless agree that it shall be used, without the necessity of taking it over again, but the account should be presented anew, and in sufficient detail so that it may be easily understood, and, so far as possible, accompanied by vouchers for actual expenditures.

It may not be improper to suggest that if moneys come into the hands of the trustee available for the purpose of paying the expenses of administration, the referee could at once, and without a hearing, direct the trustee to pay to his counsel a fair amount upon account. Apparently counsel have rendered services covering a considerable period of time without any compensation whatsoever. Such payment could be made without foreclosing the question as to what shall ultimately be allowed as compensation in full. It is to be hoped that the estate may be brought to a speedy close, including the settlement of the trustee's accounts and the payment of all valid claims on account of expenses of administration.

Transcript of Record in Support of Petition for Revision.

[Names and Addresses of Attorneys of Record.]

BEN F. TWEEDY, Lewiston, Idaho,
Attorney for Petitioner.

EUGENE O'NEILL, Lewiston, Idaho,
Attorney for Bank of Nez Perce.

In the District Court of the United States for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Referee's Certificate on Review.

To Hon. FRANK S. DIETRICH, District Judge:

I, G. Orr McMinimy, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order, a copy of which is annexed to the petition hereinafter referred to and the original of which is hereto annexed, was made and entered on the 11th day of April, 1914.

That on the 19th day of April, 1914, Norman J. Holgate, Trustee, and on the 20th day of April, 1914, Bank of Nez Perce, a corporation, whose claim has been filed and denied in said estate proceedings, both feeling aggrieved thereat, filed petitions for a review by the Judge of this court which review is granted.

That a summary of the evidence on which such order was based *proceeds* said order and is made a

part of said order and is made a part of this certificate by reference.

That the questions presented on his review are as to the allowance of the claim of the Bank of Nez Perce.

The confirmation of the sale of the real estate;

The allowance of an accounting by the trustee, and

The settlement of the estate.

I hand up herewith for the information of the Judge the following papers:

(1) The entire record of the evidence placed in typewriting by Davis E. Wolgamott under the direction and supervision of this Referee, together with copies of the exhibits introduced in evidence by the Bank, the Trustee and the Bankrupt, and all the exhibits, also all original papers introduced in evidence, with request at [1*] the time made that the original papers be made a part of the record in this cause.

(2) The Findings, Decision and Order appealed from.

(3) The petition on which this certificate is granted.

(4) All the other papers, not mentioned above, filed with me herein, all being deemed by me pertinent to this review.

Dated at Ilo, May 2d, 1914.

Respectfully submitted:

G. ORR McMINIMY,

Referee in Bankruptcy. [2]

*Page-number appearing at foot of page of original certified Record.

In the District Court of the United States for the District of Idaho, Central Division.

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Statement of Facts [of Referee].

This action came on for hearing on the 14th day of June, 1913, on motion of the Trustee Norman J. Holgate for an order affirming the sale of certain real estate and the settlement of certain accounts and charges attached thereto, and praying that they be charged against the exemptions of the bankrupt and objections of the bankrupt to the same and a petition of the bankrupt for an order allowing or disallowing all claims filed against this estate, showing cause why the claim of the Bank of Nez Perce against the estate should not be allowed and setting up a counterclaim against said claim and asking a judgment against the Bank of Nez Perce, and praying that after the claims are all passed upon and allowed or disallowed, to pay off said claims and expense in full and that these proceedings be then dismissed. To the objections and counterclaim set up by the bankrupt the Bank of Nez Perce makes answer. On these issues the matter has been heard and the Referee now renders his decision and makes such orders as he thinks just and proper in the premises.

STATEMENT OF FACTS.

After a careful examination of a large mass of

evidence introduced before him and the records of the case before him, the Referee has found very little conflict considering the length of the litigation involved and in many of these cases he has been able to reconcile them after considering the whole matter. He has been very liberal in his ruling on evidence because there has been a constant claim that the matter [3] has never been considered except by piecemeal, and he hopes that by having a full and complete hearing at this time that this expensive litigation will be stopped and stopped forever.

It appears that on the 26th day of December, 1907, Frank M. Pindel owed the Bank of Nez Perce $2,950.00 on overdrafts; that on this date Mr. Dowd, cashier of said bank at that time, went to the Pindel homestead and asked Mr. Pindel for a note signed by his wife as an accommodation payor; that after much argument and persuasion Mrs. Sarah E. Pindel was induced to sign the note; this note was payable on demand.

Pindel was arrested in March, 1908, on a charge of stealing a steer and was taken to Lewiston and tried and found guilty and was taken to the penitentiary in Boise in May of the same year. After the trial Mrs. Pindel, assisted by two boys, went into the Little Canyon and rounded up 178 head of cattle and took them to Kendrick and sold them for $3,831.00. The bank has made serious objection to her making this sale without paying their claim but Mrs. Pindel proves conclusively to me that these cattle were her own personal property.

Mrs. Pindel went to Boise during the month of

June of the same year to consult with her husband about securing a pardon and in regard to the settlement of his business affairs. Both Mr. and Mrs. Pindel testify that they talked over the sale of Mr. Pindel's property for the purpose of paying off this note. While she was away the Bank brought this action and on the 27th of June had an attachment issued.

When Mrs. Pindel came back from Boise she went to the office of E. O'Neill, attorney for the bank, and she and Mr. O'Neill agreed to have the property taken under attachment sold and the purchase price applied upon the debt; this was on the 10th day of July; Mr. Dowd was called on the phone and told of the agreement and Mrs. Pindel borrowed some stationery from Mr. O'Neill and made a written statement of the terms of the agreement and mailed it to Mr. Dowd (this is Creditor's Exhibit 19). [4]

Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Morgan on the 14th of July. On the 17th of July Mrs. Pindel called up Mr. Dowd and told him she had a buyer for a small team, but Mr. Dowd told her that if she wanted to sell any more she would have to deal with the sheriff.

Mrs. Pindel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment was issued on August 13th.

Mrs. Pindel returned again to Boise to take up the matter of the pardon of her husband, and in her absence and in the absence of her husband, on the 15th of February, 1909, a trial was had and a judgment

was entered against the bankrupt and his wife for $3,635.16.

On March the 8th an execution was issued and placed in the hands of Harry Lydon, who had made the attachment as sheriff, but whose term of office had expired on the second Monday in January and Harry Lydon sold the balance of the grain and stock remaining in his hands on the 6th day of April, 1909. This execution was returned.

On the 6th day of December, 1909, another execution was issued, and under this execution proceedings were had in the Probate Court of Nez Perce County looking to the purpose of having the homestead appraised. An appraisement was made by three good and disinterested parties; the bank was not satisfied with this appraisement and they proceeded to ask for another appraisement. Soon after this the bankrupt filed his petition in bankruptcy in this court and was declared a bankrupt.

The trustee under the direction of Mr. O'Neill seized a large amount of personal property not scheduled in the bankrupt's petition, and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife, and as such was set off to her by the Judge.

A meeting of creditors was called and duly noticed for the purpose [5] of passing on the question of selling the real and personal property, but before the Referee could pass upon the matters presented at this meeting the whole proceedings were removed by a petition in intervention to the Judge of this court by Mrs. Pindel. The Judge passed upon such matters

as were before him and made his order to the Trustee of January 5th, 1911, which order was affirmed by the Circuit Court of Appeals.

On the 1st day of March, 1913, a petition was filed by Mr. O'Neill *had* an *ex parte* order *order* signed by this Referee directing a sale of the real estate. A sale was had, and upon the motion to confirm this sale these proceedings were had before this Referee.

Under the first and void attachment the following property belonging to the bankrupt was taken by the sheriff over and above certain other property afterwards set off as exempt to his wife:

Property.	Value.
1 stallion	$ 700.00
3 Bay mares, weight about 1400	900.00
2 black geldings, weight about 1200 each	500.00
1 brown mare, weight about 1300	250.00
3 small saddle or work horses, weight about 1100	450.00
Six head of cattle, not returned	200.00
19 head of hogs	380.00
110 acres of oats at $15.00 per acre	1650.00
35 acres of timothy	525.00
30 acres of Indian allotment of oats and wheat	450.00
Hay and grain in barn	100.00
Use of exempt horses while seized and held	102.00
13 acres of timothy hay destroyed by pasturing	195.00
Pasture on the Bunce Place	20.00
Total	$6522.00

There was no return on the first attachment and a small portion of this property was not returned as attached by the sheriff on his return on the second attachment.

The value set opposite the items are taken from the evidence of Mrs. Pindel supported by the evidence of such reliable and well-informed witnesses as W. T. Simmons, John McKenna, William Campbell and others. [6]

In addition to this the bankrupt is asking to set up a claim of damages for $600.00 for the taking of property belonging to Mrs. Pindel, which claim I am of the opinion was fully proved and not disproved by the Bank, and Mrs. Pindel has agreed to allow this setoff of her claim to be made.

There is no evidence to show that this property was ever returned to the bankrupt or his wife after the dissolution of the void attachment, but the cost bill (Bank of Nez Perce Exhibit 14, at page 599 Trans.) would indicate that none of it ever was.

This property, or all of it that was not destroyed or died, was sold at three sales, one on the 14th of July, 1908, when 5 hogs were sold to Mr. Morgan under the July 10th agreement, one under order of Sept. 18th, 1908, by the District Judge, of a 2-year-old stallion and the balance of the hogs, and one on the 6th day of April, 1909, by Harry Lydon, when the grain and the balance of the stock were sold.

The first amounted to about $57.00, the second to $131.50 and the last to about $2,000.00; the return on the execution is gone from the record and I cannot give the exact figures on this. The amount returned

on the last sale is the only amount that has been applied on the judgment. (See Judgment Docket "Bank of Nez Perce, Exhibit 17," page 605 Trans., Bank's Reply to Answer Brief of Bankrupt, page 51, Mr. Dowd's testimony Trans., 351.)

There was a great amount of grain wasted on the ranch after the attachment and the stock held until the April sale were in very *prro* condition. Orville M. Collins of Uniontown, Washington, was the purchaser of said stock at said sale and this stock was not in such condition but what they could be restored to normal condition by Mr. Collins by good care and feed before spring work commenced.

The Bank of Nez Perce has gone out of business and this action is continued by its attorney for the benefit of its president, Mr. Collins. This homestead has increased from a value of four or five [7] thousand to fourteen or fifteen thousand dollars in value during the life of this litigation and Mr. Collins is the purchaser of this land at this sale for $10,500.00. The value has been proven by such reliable and competent witnesses as Mr. Lyons, Mr. Simmons, and others.

The bankrupt was kept in prison until the spring of 1909, when the Idaho State Board of Pardons found that he had been unjustly convicted and gave him a full pardon. The bankrupt was therefore not present during all of these proceedings in the District Court and his wife was left to take care of matters the best way she could.

Claims to the amount of $258.50 have been proved and allowed in this estate to date.

Opinion of [Referee].

The Referee has covered the important questions of fact and any others that may occur to him will be mentioned by him as he proceeds to consider the law in connection with the facts in his opinion and the orders resulting therefrom.

He has read with pleasure the extended briefs of counsel for both sides, although his work has been difficult at times, owing to the failure of attorneys to make specific reference to page and line of the transcript when they refer to the evidence.

It is unfortunate indeed that so much valuable property should have been wasted in so much litigation, and the Referee takes up these matters in the same spirit as the Court expresses in his letter (Bankrupt's Exhibit 2, Trans., page 456) when he says that he is ready at all times to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

It is my opinion that Mr. Dowd expressed his honest opinion of the criminal proceedings in his letter of July 29th, 1908 [8] (Bank of Nez Perce's Exhibit 24, Trans., page 621) in the following words: "You still have the elements of manhood in you, if you are in the Pen, and it is my opinion, and the honest opinion of all acquainted with the case, that you didn't get a square deal," and that he would not have protested against the pardon had he not been so

advised for the purpose of making Mrs. Pindel "dig up."

The question of the allowance of the claim of Bank of Nez Perce appeals to me as the first for my consideration. In his order of the 20th day of May, 1911, the Judge of this court directs the sale of this land subject to my directions. This, I take it, leaves the sale largely in my discretion and I am of the opinion that an order of sale of $15,000.00 worth of property for the purpose of paying a total of $258.50 of allowed claims after the time for filing claims expired, especially for $10,500.00 to Mr. Collins under the circumstances, thereby making a profit to him of four or five thousand dollars in the transaction, or the confirmation of such a sale, would be an abuse of such discretion and would not exhibit the spirit of the Court heretofore spoken of.

Counsel for the Bank stoutly maintains that the creditors whose claims have been allowed are entitled to interest but I find no law authorizing such interest and it has not been the practice of this Court to allow interest on approved claims after their allowance.

The Bank of Nez Perce bases its claim wholly on the judgment obtained in the State District Court; as against this the bankrupt claims a setoff of certain damages arising from a void attachment, a breached contract and a void execution sale and prays for a judgment for the difference between the amount of such damages and the amount of the claim proved.

The bank insists that if there were any such damages that they were not responsible for the acts of

the sheriff and his keepers; that under our statutes and the decisions of our Supreme Court such damages should have been set up as a counterclaim in the State Court, [9] and the bankrupt having failed to do so, they have become merged in the judgment and are now *res adjudicata.* Otherwise they should be tried out in the State Court before a jury, maintaining that a jury is a constitutional right.

We might say in passing that a jury is not an unknown quantity in the bankruptcy court, and if counsel for the Bank had requested one at the beginning of this hearing, he could certainly have had one.

Remington on Bankruptcy, sec. 404.

The question of setoffs, counterclaims and recoupments is covered by sec. 88a of the Bankruptcy Act of 1898. The term "Mutual Credit" as used in equity means a credit agreed upon by the parties, or arising out of connected transactions (Story Eq. Jur., sec. 1435), but in bankruptcy statutes "mutual credits" are extended to mean that the parties are, or in the natural course of events will be, creditors of each other. (Lowell Bankr., sec. 255.) So we see in the beginning that the Bankruptcy Courts are inclined to take a broad view of the question of setoffs, counterclaims and recoupments.

The position of the bank as to the merger of all damages in the judgment and therefore *res adjudicata* might be correct if this action had followed the usual course of events, that is, if the property taken under a void attachment had been returned to the bankrupt, if there had been retaken and sold at a

valid execution sale, but this was not the condition of the record.

It seems to me that there is no question but the property sold on the 6th day of April was sold by Mr. Lydon after he had retired from office and under process issued after his term had expired and therefore void.

There is no return on the first attachment and therefore there is nothing to prevent the bankrupt from going behind the attachment and showing the property actually taken by the officer. [10]

This makes the officer a trespasser *ab initio* (4 Cyc. 507). The return, however, if there was one, would not be conclusive (Jefferson County Saving Bank vs. Eborn (Ala.), 4 So. 386), and the attaching plaintiff is liable for the damages caused by the officer and his keepers (Kerr vs. Mount, 28 N. Y. 659).

There being a void attachment and no return, and no return of the property to the defendant and a void sale under execution, there was a continuing damage from the time the first levy was made up and until the sale was made, and therefore the defendant's right of action did not fully accrue until judgment and execution, and the defense could not have been set up in an answer or in a cross-complaint.

Again, the Bank repudiated the agreement of July 10th, 1908, and the damages from this breach of contract extended over to the time of the final judgment, and I therefore cannot find any reason whatever that the bankrupt cannot urge the damages caused by the void attachment, the breach of agreement and the void execution sale.

It might also be said that the judgment has been fully paid and satisfied (17 Cyc. 1395, 1396 and notes 44, 45, 48, 49; Banks vs. Evans, 48 Am. Dec. 734; Brown vs. Kidd, 34 Miss. 291).

The attaching plaintiff has levied on $6,522.00 worth of personal property to satsfy a judgment for $3,635.15 or some $3,000.00 more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts *prima facie* to the satisfaction of the judgment (23 Cyc. 1488, 1489; Freeman on Judgments, Vol. 2, 4th ed., pp. 819, 820, sec. 275, p. 817). The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case.

I agree with counsel for both sides that there has been much litigation [11] since the 24th day of July, 1908, over this matter but that does not excuse the destruction of so much property.

I do not think it necessary to go into the matter of the manner of the assessment of the damages and computing the interest thereon, as the setoff is so much greater than the claim and I am unable to find any authority for entering a deficiency judgment against the bank and in favor of the bankrupt.

It was not only the right but the duty of the bankrupt to examine all claims and advise the referee as to their correctness (Bankr. Act 1898, sec. 7a, 3), and if the trustee does not contest an unjust claim

as he has not in this case, it is the privilege of the bankrupt to do so.

Remington on Bankruptcy, sec. 826.

In this case it is admitted that the claim of the Bank as originally filed was not correct (Bank's Reply Brief to "Answer Brief of Bankrupt," p. 51).

In all that I have said here I have assumed that there was legal service made on the bankrupt of the summons in the original case. The Bankrupt denies this and denies the employment of an attorney to represent him in the case. In the hearing in the case before me on the 8th of August, the Bank introduced a number of copies of letters which Mr. O'Neill says passed between him and the warden of the penitentiary at the time, *when* tend to show that there was service, but the proof is very unsatisfactory at the most.

As to the sale, I am of the opinion that the petition for sale should have been filed and notices of a hearing on the same. This would have eliminated the cost of a sale under the circumstances surrounding the one made. At the time the *ex parte* order was made the Referee suggested this, but counsel for the Bank and trustee maintained that the notice given the creditors of the meeting held in December, 1910, was sufficient. He has evidently changed his mind, [12] as indicated by his filing at the August meeting of waivers of notice of a hearing on the part of certain of the creditors. This would not cure a void sale and especially as to notice to Mrs. Pindel, who is as much interested in the sale of her home-

stead as anyone could be.

Blood vs. Munn (Cal.), 100 Pac. 694.

As to the expense of the Trustee for taking and keeping personal property which was not in the schedules and without an order of the Court, by doing so the Trustee took this property at his own risk, and since this property has been held by the District and Circuit Courts to be property belonging to Mrs. Pindel, I do not feel like taking the expense of taking and keeping this property from the estate of the bankrupt.

Remington on Bankrupt, sec. ——.

I find no authority for allowing the trustee a *per diem* for his work in the case. I can allow his expenses in certain cases, but he receives as his compensation for his work a Commission and nothing else.

I have examined the claim of the attorney for the trustee very carefully, and from circumstances I find that $200.00 is a reasonable and sufficient compensation for all work done by him.

Appended to the report of sale is an accounting which under ordinary circumstances would be set out in a final accounting. I do not know why this was done except for the purpose of having the total amount taken out of the homestead allowance of $5,000.00. This I could not do under the specific direction or the order of the District Judge of May 20, 1911, nor do I find any law for any such proceeding, as our statute contemplates that the bankrupt is entitled to the $5,000.00 exemptions under any and all circumstances and this cannot be taken from him

either by law or by equity or on equitable grounds as claimed by counsel for the trustee and the bank.

Remington on Bank., sec. 2010.

Neither can I hold that the amount assessed against the bankrupt [13] and his wife in the Circuit Court should be assessed against the exemptions of the Bankrupt or against the estate for the reason just stated.

I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney, but now after a year has expired this has not been done, but the bankrupt has prayed for a settlement in the nature of a composition under the bankruptcy act, and I will do the best I can to adjust the whole matter.

Several of the witnesses whose claims for fees in previous hearings is based on testimony given as to the value of the homestead which was material to the consideration of the cause in the upper court I think should be allowed.

I do not think that the trustee is entitled to pay at $3.00 per day for hunting hogs belonging to Mr. Pindel.

The Referee has the power to assess costs against the losing party in this proceeding.

I have been very liberal in my rulings on evidence because I have wanted the whole matter to come before me, and there has been a continual complaint that this case has never been tried out as it should be but only by piecemeal.

I do not think that the sum of $10,500 is suffi-

ciently large to warrant me in ordering the confirmation of this sale.

Grain and hay raised by bankrupt after adjudication does not become a part of the estate. (Rem. on Bank., sec. 1130.)

Order [of Referee, Disallowing Claim of Bank of Nez Perce].

IT IS THEREFORE ORDERED that the claim of the Bank of Nez Perce be disallowed and the costs of this bearing be taxed in favor of the bankrupt and against the Bank of Nez Perce;

That the sale of the homestead be not confirmed;

That the accounting of the trustee be allowed in the sum of $349.95;

That the bankrupt pay to the trustee within 30 days from the date of the filing of this order the sum of all allowed claims in the sum **[14]** of $258.50; the sum of the expenses of the administration of the estate by the trustee as aforesaid in the sum of $349.95; the sum of $5.83 commissions of Referee and filing fees on 13 claims, and the sum of $17.28 commissions of trustee, making a total $631.56, and the bankrupt is hereby empowered and authorized to execute and deliver a mortgage on said homestead for the purpose of securing said sum if necessary.

That if for any reason the bankrupt fail or refuse to pay said sum to the trustee, that the trustee sell said homestead to the highest bidder according to law and make return of said sale to the Court and upon confirmation thereof pay to the bankrupt and his wife the sum of $5,000.00 and deposit the balance

in the Ilo State Bank, subject to the further orders of the Court.

That if the bankrupt pay said sum of $631.56 to the trustee, that the trustee report the same to the Referee and deposit the same in the Ilo State Bank subject to the order of distribution of the same, which order the Referee will make when such report is made.

WITNESS my hand at Ilo, this 11th day of April, 1914.

G. ORR McMINIMY,
Referee in Bankruptcy.

[Endorsed]: Filed May 6, 1914. A. L. Richardson, Clerk. [15]

In the United States District Court for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Opinion [of Dietrich, D. J.].

BEN F. TWEEDY, Attorney for Bankrupt.
FINIS BENTLEY, Attorney for Trustee.
EUGENE O'NEILL, Attorney for the Bank of Nez Perce.

DIETRICH, District Judge:

The trustee in bankruptcy and the Bank of Nez Perce, a creditor, hereinafter called the Bank, submit for review an order made by the Referee on April 11th, 1914, allowing the trustee's account in part, rejecting the Bank's claim as a whole, and de-

nying confirmation of the sale of real estate. A voluminous and complicated record is presented, a mere sketch of which would be of inordinate length, and therefore I shall attempt little more than to state in brief the reasons upon which my conclusions are based.

FIRST: THE CLAIM OF THE BANK OF NEZ PERCE.

The proceeding is in voluntary bankruptcy. The petition and schedule were filed February 10th, 1910, and the adjudication was made February 14th, 1910, and thereafter a trustee was regularly appointed. On February 9th, 1911, the Bank's proof of claim was filed in due form with the Referee, but for some reason which does **[16]** not satisfactorily appear it was neither allowed nor disallowed, although no objection was ever interposed there to until after the lapse of more than two years, when the bankrupt set up the defenses now relied on, chiefly in the nature of counterclaims or setoffs. The claim is founded upon a judgment obtained by the Bank against the bankrupt and his wife, Sarah E. Pindel, in the District Court of Idaho, for Nez Perce County, on February 15th, 1909, for $3635.16 and costs taxed at $1747.12, making a total of $5382.28. Upon this judgment there was credited the proceeds of the sale of certain attached property, amounting to $1956.25, leaving a balance of $3426.03, which, together with interest, constituted the claim as set forth in the proofs filed. In the schedule accompanying the petition in bankruptcy the bankrupt listed this as an unsecured claim against the estate,

there being a small discrepancy only, the amount schedules being $3427.93 instead of $3426.03. He now asserts that no such claim existed but that the judgment had been wholly swallowed up or extinguished by the setoffs referred to.

It is to be further noted that in the schedule, under appropriate headings, the bankrupt represented that he held no unliquidated claims or choses in action of any kind against any person. In explanation of the inconsistency of his positions then and now, he testifies that in making up the schedules he acted upon the advice of counsel, but his testimony in this respect is uncorroborated, and in the light of all the facts and circumstances I am unable to give it credence. If, however, we assume that he was advised to say nothing about the claims, what must have been his purpose in keeping them concealed? Was it to induce the Court to exercise a doubtful jurisdiction? Or was silence to be kept until the bankruptcy proceedings had terminated and the bankrupt had been discharged, thus leaving him free to press his claims for damages against the Bank after its claim had been wiped out? I can conceive of no other possible reason for such a course; but either purpose would constitute a palpable fraud from the results of which the perpetrator **[17]** ought not to be relieved. A debtor who has sought and secured the protection of a court of bankruptcy and has therein obtained a discharge from the obligation of his debts, as is the case here, will not be heard to impeach the truthfulness of the representations upon which his prayer

for relief was predicted.

Added to this consideration is the further fact that in the special proceeding relating to the sale of the real estate which resulted in the order of May 20th, 1911, later affirmed by the Circuit Court of Appeals, the bankrupt and his wife and the Bank as well as the trustee all participated, and although the necessity for making the threatened sale which the bankrupt and his wife sought to prevent rested upon the assumption that the Bank's claim was valid, at no time was it put in issue, nor was a suggestion ever made that the sale should not be ordered because there was substantially no indebtedness to pay. The primary question then, as now, was whether the homestead should be sold, and if the issue can properly be raised at this time, it could have been with equal propriety raised at that time. Not only was the justness of the claim then unquestioned, but inferentially the bankrupt admitted its validity. In their petition for review presented to the Appellate Court he and his wife represented "that the bank of Nez Perce, with a claim of $3427.93, and C. C. Triplett with a claim of $70.85, were the only judgment creditors, and that the balance of the claims scheduled and allowed as claims in the bankruptcy court were all in existence at the time of the appraisement and adjudication in the Probate Court, etc." Here is a clear implication of an understanding not only that the claim was valid, but that it had been allowed by the bankruptcy court, and such was the assumption upon which the proceeding was tried all the way through

and upon which the order of May 20th was made. Surely, if there had been any suggestion of the issue not presented for the first time, the Court would not have ordered a sale to pay a debt which might, in fact, prove to have no existence at all; it would have required that issue to be first [18] tried out. That was the time for the bankrupt to speak and to claim his defense if any he had. The Courts will not try a controversy in piecemeal; there must be an end to litigation. The bank was then seeking a sale of the real estate for the payment of its claim. If we now credit him, the bankrupt had two defenses. He pleaded one of them, went to trial, failed, went to the Appellate Court, again failed, and after all the delay and expense, and when the order of sale is about to be made effective, he draws from its concealment his other defense. Under a familiar rule he should not again be heard. A judgment is an adjudication not only of all defenses actually interposed, but as well of all which might have been interposed. It is thought that not only by the representations made in the schedules but by an order of May 20th, the bankrupt is estopped from setting up the counterclaims at this time.

But if we consider the facts so far adverted to not as amounting to an absolute estoppel but as being material only in so far as they tend to impeach the good faith of the bankrupt in asserting a claim for the first time after the lapse of between four and five years after the date of its accrual, during which period he was hard pressed by his debtor and had

every incentive and provocation to speak, the result must be the same. The judgment in the State court is unquestionably valid, and the sale of the attached property was legally made. Under the rule established by the Supreme Court of the State the judgment concluded all claims for wrongful attachment (Willman vs. Friedman, 4 Idaho, 209; 38 Pac. 937). But were it otherwise, undoubtedly the second attachment was valid, and the evidence is insufficient upon which to base a finding of damages on account of the execution of the first writ. Touching the charge of negligence it may be that the sheriff did not handle the property with the highest degree of skill. But we must remember that it is not one of the requisite qualifications of a sheriff that he be an experienced farmer or stock-raiser. Apparently the plaintiff was **[19]** not unmindful of the possible limitations of this particular sheriff in that respect or of the dangers of imposing upon officers of the court the duty of caring for, maturing, and harvesting a crop and holding it for the highest possible market, and caring for livestock of various kinds for an indefinite length of time, for it appears to have sought to have the attached property sold without delay. This application was successfully resisted by the defendants in the action, and apparently upon their suggestion the Court made an order in a measure limiting the discretion of the sheriff in incurring expense for the proper care of the property. The conduct of plaintiff's wife who, to say the least, is unusually resourceful and persistent, tended to render the duties of the sheriff un-

necessarily difficult, and at the sale to chill the bidding. It is, of course easy enough at this late day to produce opinion testimony tending to show that the property was worth much more than it sold for, and that it might have had better care. Upon such an issue the passing of time usually operates in favor of the claimant and against the officer, especially in cases where, as here, the officer is without notice that any claim of damages will be asserted and therefore has no reason to fortify himself by gathering and preserving the necessary evidence. It was doubtless for that reason that the legislature has provided (Sec. 4055, Subdivision 1, Revised Codes of Idaho) that an action upon such a claim against an officer must be commenced within two years from the time the cause of action accrues. The theory of the law urged by counsel for the bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy in turn is against that officer and his bondsmen. But here the defendant waits until any remedy which the Bank may have had against the sheriff is cut off by the statute of limitations, and then for the first time asserts his claim. As a further consideration it is to be observed that upon his appointment these counterclaims vested in the trustee, and it is apparent that if he had brought a plenary suit thereon against the bank at the time they **[20]** were first put forward by the bankrupt in this proceeding, Sec. 4054 (Subdivisions 3 and 4) of the Idaho Revised Codes, pro-

viding for a three year period of limitations for actions for trespass upon real property and for taking or injuring personal property, could have been successfully pleaded in bar. While in terms these statutes do not apply to a proceeding of this character, the principle is the same; in equity the bankrupt should be held to be barred by his own laches.

Thus far the discussion has been upon the assumption that a claim for liquidated damages for a tort may be set off against a claim upon a judgment, but may this be done? If the question be referred to the Idaho Statutes, it is plain that under sec. 4184 of the Revised Codes the answer must be in the negative, for clearly the claim does not fall within subdivision 2 thereof, and in so far as it comes within the first subdivision, it should have been set up in the original action, and must therefore be held to be barred or extinguished under the rule of sec. 4185 and Willman vs. Friedman, *supra.* If the view be taken that the Idaho Statutes do not apply and that the question is to be referred to the bankruptcy act alone, seemingly the same conclusion is unavoidable. Sec. 68 provides for a setoff of "mutual debts and credits," but declares that a counterclaim cannot be allowed in favor of a debtor unless the claim is provable against the estate. Sec. 63 defines the claims which may be proved and provides in Subdivision b that "unliquidated claims against a bankrupt may, pursuant to application to the Court, be liquidated in such a manner as it shall direct and may thereafter be proved and allowed

against the estate''; but this provision is held not to enlarge the scope of subdivision a, and unliquidated claims arising out of torts, such as are here relied upon, are not covered by subdivision a. See Remington on Bankruptcy, Secs. 704, 705, 706, and cases cited thereunder. In Becker Brothers (139 Fed. 366) the precise question was involved. The impropriety of the *court* here pursued is shown *of* the counterclaims. **[21]** He simply finds that they exceed the Bank's claim, but if they may be waged as counterclaims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined, so that the estate may have the benefit of the surplus, if any there be, after offsetting the claims of the Bank.

Counsel for the Bankrupt severely criticises the Bank and its officers for the institution and maintenance of the attachment suit. True, such suits are often harsh and entail much unnecessary loss, and here the waste of property in expense of litigation, and in the deterioration incident to seizure and sale under judicial process, is most deplorable, but for the most part the defendants to the action must themselves bear the blame. Had the bankrupt remained in control, I am inclined to think that he would have met his obligations in a straightforward manner and there would have been no necessity for the suit, but the circumstances tend to show that when he was placed under disability, his wife started out with the purpose of evading their just obligations to the Bank. She sold enough prop-

erty to pay its claim in full, and although apparently there was no other need for the proceeds of the sale, she failed to apply any part thereof to the payment of debts and conducted herself in such a way as to give ground for the suspicion that she purposed to put all their property beyond the reach of the Bank. It is incredible that the Bank desired to do them any injury or had any purpose other than to secure protection for the indebtedness which was justly due it.

It is said that after the attachment was levied the Bank violated an agreement it made with Mrs. Pindel for the sale of the attached property at private sale. The facts relied upon are evidenced solely by a letter written by her to an officer of the Bank, and it is only necessary to say that no agreement is disclosed. The letter is wanting in the essential elements of a contract and amounts to nothing more than an indefinite conditional proposal.

To conclude upon this branch of the case, it is held that **[22]** the Bank's claim as shown in the proofs filed with the referee should be allowed for the full amount thereof subject to a deduction of $131.50, which it appears was received by the attorney for the Bank and not credited on the judgment. Interest upon the amount since the filing of the petition may or may not be allowed, depending upon the facts as they may ultimately develop. Brandenberg on Bankruptcy (3 Ed.), sec. 1061.

CONFIRMATION OF THE SALE.

In sustaining the claim of the Bank I have dis-

posed of the principal objection to the confirmation of the sale. There are, however, some additional considerations.

On May 20th, 1911, after a hearing, in a special proceeding instituted by Mrs. Pindel, in which the bankrupt, the trustee and the Bank actually participated, and in which the bankrupt and his wife maintained that the land in question was a homestead and not subject to administration, I found the value of the property to be $9,000.00, and directed that upon the payment into court by the bankrupt for the benefit of the creditors, of the sum of $4,000.00 within thirty days, the entire tract be set apart as a homestead. In default of such payment the trustee was authorized to sell the land in the manner provided by law, and under the direction of the referee, for not less than $5,000.00. Out of the proceeds of the sale, $5,000.00 was to be paid to the bankrupt and his wife and the balance if any, was to be distributed in due course of administration. Being dissatisfied the bankrupt and his wife sought a review in the Circuit Court of Appeals where the order was affirmed, the mandate being filed here on April 9th, 1912. Now, it is clear that by this order no discretion was left either with the trustee or the referee touching the question of whether the property should be sold, provided a sale could be had for an amount in excess of $5,000.00. Only the details of the procedure—[23] the time and place and manner of sale—were left to the sound discretion of the referee. Unfortunately this view did not prevail. If the bankrupt

had any cause to show why the sale should not proceed as directed, he should have applied to this Court, where the order was made, for its modification or for a stay of its execution. If this course had been pursued, instead of applying to the referee, whose only duty was to see that the order was given effect without unnecessary delay and who had no authority to grant a stay, much time and expense would have been avoided. However, at this juncture I am not so much concerned in determining who is primarily and chiefly at fault for the extraordinary delay which has intervened as I am in seeing that the proceeding is now brought to a speedy close.

As to the specific objections to confirmation, complaint is made, first, that the order of sale provides for the deduction out of the $5,000.00 exemption allowed to the bankrupt and his wife, of the costs and expenses of the appeal to the Circuit Court of Appeals. While the provision is unwarranted, it is mere surplusage and clearly nonprejudicial.

As to the next objection, it is not thought that the terms of sale prescribed in the notice are necessarily in conflict with the order of sale; and unquestionably they are fair and reasonable.

Complaint is also made that notice was not given to the creditors of the hearing of the petition for an order authorizing the sale. But it appears that shortly before the intervention of Mrs. Pindel due notice was given as required by law of the hearing upon the trustee's petition for such order, and that at a meeting of creditors called for that purpose

a majority of them both in number and amount of their claims appeared and voted in favor of the sale. The referee thus acquired jurisdiction to make the order. No creditor now appears to oppose confirmation and eight out of the eleven whose claims were filed have in writing expressed their approval of the order; the three other claims are trivial in amount. Even if we assume that Mrs. Pindel was entitled to notice, it is to be observed that she originally appeared and in **[24]** both this court and in the Circuit Court of Appeals unsuccessfully opposed the sale.

The one remaining question is whether a fair price was bid. The highest amount offered was $10,500.00, that being $5,500.00 in excess of the estimated value placed upon the property in the schedules filed by the bankrupt, and $1500.00 in excess of the value established by the order of May 20th. Whether a higher price could now be received is extremely doubtful. Probably if a contemplating purchaser could be assured that upon paying the price and receiving the trustee's deed his title would be exempt from assault and he would be left in peace, an advance could be realized at another sale; but neither the trustee nor the Court can furnish such a guaranty. Assurance can be given of good title, but not of the acquiescence or submission of the debtors. Perhaps in the case of any judicial sale the possibility that the title will be called into question tends to depress the bidding, but I am inclined to think that owing to the attitude of Mr. and Mrs. Pindel,

the consideration operates to an unusual degree in the present case.

As to the weight to be given to the findings of the referee I am not unmindful of the general rule invoked by the bankrupt. This rule, however, is not inflexible, and owing to conditions which it is needless to detail, I have felt it to be my duty to consider anew the entire record. Manifestly the referee was in a measure influenced by matters which are either wholly immaterial or are no longer open to consideration.

Although I have thus found that the sale was legally and fairly made, I am reluctant to confirm it forthwith and thus absolutely cut off all rights of the bankrupt and his wife. True, in some respects their conduct has, during the long period of litigation, been ill-advised, and it is apparent that if they had applied to the discharge of their obligations the energy and money spent in attempting to escape them, they would to-day be much better off, but I am inclined to deal tenderly with property constituting the home of a debtor, and so far as may be possible to preserve the value which by reason of its associations it has for him and for [25] no other. I have, therefore, decided to enter an order of confirmation, not to become absolute or final, however, until the expiration of thirty-five days from the date of the filing hereof and to become of no effect if within that period the bankrupt shall cause to be paid to the trustee, to be applied and distributed as assets of the estate, the sum of $5,500.00, with interest thereon from April 5, 1913, at the rate of 7%

per annum up to the date of such payment. The order is to further provide that until such payment shall be made the bankrupt and his wife are restrained from selling or removing from the premises any of the hay or other crops growing thereon at this time, it being the intent that if redemption is not made within the thirty-five days as provided, the confirmation of the sale and title of the purchaser shall relate back to this date with provision hereafter to be made for the equitable division of the crops between the purchaser upon the one hand and the bankrupt and his wife on the other. I do not think that substantial injury will result to anyone by reason of this additional period of grace. Apparently the bidder at the sale was acting upon behalf of the bank, and if the latter gets the benefit of the purchase price with interest, or in case the debtor fails to make the required payment, the land and a just proportion of the crops, its rights will be substantially protected.

It may be proper to add that I see no reason why anyone who is willing to make a loan to the bankrupt should hesitate to take a mortgage upon the land in question in order to enable the bankrupt to raise the requisite amount, out of fear merely that the title is imperfect as a consequence of the bankruptcy proceedings. Upon the payment of the amount above specified, an order will be made absolutely releasing the property from administration and awarding it to the bankrupt free from all claims of creditors, and if the value of the property is as great as the bankrupt now represents it to be, he ought to have

no serious difficulty in procuring the requisite funds. [25½]

The other phase of the case, namely, the trustee's accounts, it is unnecessary to dispose of at the present time, and that is left for future consideration.

Dated June 3d, 1914.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [26]

In the United States District Court for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Order Confirming Sale of Real Estate and Containing Other Provisions.

The petitions of the trustee and the Bank of Nez Perce for a review of an order of the referee dated April 11, 1914, denying confirmation of the sale of certain real estate to Orville M. Collins, made by the trustee at public auction on the 5th day of April, 1913, for Ten Thousand Five Hundred ($10,500.00) Dollars, having been duly submitted and considered;

It is ordered that the said order of the Referee be and the same is hereby reversed, and said sale confirmed. Such confirmation, however, is not to become absolute or final until the expiration of thirty-five days from the date hereof, and if during that period the bankrupt, Frank M. Pindel or his wife, Sarah E. Pindel, shall cause to be paid to the trustee the sum of Fifty-five Hundred ($5,500.00) Dollars with interest thereon at the rate of 7% per

annum until paid, to be applied and distributed as assets of the estate, thereupon this order shall become of no effect and said lands and the whole thereof shall be set apart as the homestead of said Frank M. and Sarah E. Pindel, and shall be exempt from administration and free from all claims of creditors. Upon the other hand, if said payment is not made within the time specified, upon the expiration of said period this order shall be deemed to be final and absolute, and the trustees shall, upon receiving the full purchase price, execute and deliver to said Orville M. Collins or his assigns a proper instrument of conveyance, and said conveyance shall be deemed to relate back to the date hereof. [27]

It is further ordered that until further order of this Court the said Frank M. and Sarah E. Pindel and all persons acting for them or under their direction be and they are hereby restrained from removing from said land or selling any of the hay or other crops now growing thereon; provided that in so far as may be reasonably necessary said crops and grass may be harvested, but not sold or removed; it being the intent that if redemption is made from said sale in the matter provided, all of said crops shall go to said Frank M. Pindel and wife; otherwise an equitable division between them and the purchaser shall be made. The lands hereinbefore referred to are described as being lots numbered One (1), Two (2), Three (3) and Four (4) in Section Thirty-four (34), and lots numbered Twenty-nine (29), Thirty (30), Thirty-one (31) and Thirty-two (32) in Section Twenty-seven (27), Township Thirty-four (34)

North, Range One (1) West of Boise Meridian, containing approximately One Hundred Sixty (160) Acres, all in Lewis County, State of Idaho.

Dated this 3d day of June, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [28]

In the District Court of the United States for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Order Allowing Claim of Bank of Nez Perce.

The petition for the Bank of Nez Perce for a review of the Referee's order of April 11th, 1914, rejecting its claim, having been duly submitted and considered:

It is ordered that the Referee's said order be, and the same is hereby reversed and said claim is approved and allowed for the principal sum of Thirty-two Hundred Ninety-four and 53/100 ($3294.53) Dollars, together with interested thereon at the rate of 7% per annum from February 15, 1909, to February 10, 1910, the date of the filing of the petition, amounting to Two Hundred Twenty-seven and 30/100 ($227.30) Dollars, making a total of Thirty-five Hundred Twenty-one and 83/100 ($3521.83) Dollars. Interest to be hereafter allowed on said total amount from said last mentioned date, or with-

held, pursuant to general rules of law and as the facts may warrant.

Dated June 3, 1914.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [29]

268.

Testimony of Mrs. Pindel.

Q. When did you first know that you had been sued or that the property of either of you had been attached?

A. On my return from Peck I found the papers laying on the table at home.

Q. First state what was attached on the 29th day of June, 1908, on the first writ of attachment issued in the case of Bank of Nez Perce against your husband and yourself pending in the State court on that day in 1908, and, second, state how you know this property was attached, giving all the facts in the matter.

A. "*i* head of hogs, 14 head of horses, 8 head of cattle, 80 acres standing crop on Indian land (60 acres of wheat and 20 acres of oats on the Indian land), 160 acres at the home place (110 acres in oats on the home place, 35 acres of timothy, 15 acres pasture). My understanding is it was all attached, the papers that I found on the table when I came home from Peck and my trip to Lewiston, to see Harry Lydon, the sheriff, on July 10th, 1908, is how

(Testimony of Mrs. Pindel.)

I got my information. I went to Harry Lydon's office, the Sheriff's office, and he told me he had attached all the personal property and the homestead and advised me to go to Mr. O'Neill's office; he called Mr. O'Neill up over the phone at the Sheriff's office before I started to Mr. O'Neill's office, told me I had better go in there and settle with them if I could. I went to Mr. O'Neill's office, introduced myself to Mr. O'Neill, told him Harry Lydon had sent me there and *ask* him what we could do in the regards of settling the note, and about the first reply I got from Mr. O'Neill was that they would just tender me $5,000 and put me off of that ranch. I told him if he would let me and release to me enough of the attached property that I could sell I would settle Frank Pindel's accounts or the note as far as I could. He said he would see Dowd—called Dowd up over the phone, talked to Dowd over the phone. After Mr. O'Neill and I had agreed to this settlement Mr. O'Neill asked me to write a letter to Mr. Dowd and tell him what I could do.

Q. Now, what settlement was it that you reached with Mr. O'Neill and Mr. Dowd, explain to the Court, at that time? [30]

269.

A. I told Mr. O'Neill that I could give them 200 acres of standing crop and the hogs and cattle they had attached and I would sell enough of the small teams to pay the note or Frank's account if I could. They *excepted* the offer, sold hogs to Dan Morgan, 5 head was to *appy* proceed of the sale to the note and I was to sell the attached property with the

(Testimony of Mrs. Pindel.)

understanding with the Sheriff that the proceeds of the sale should be applied to the note. Dowd sent Morgan to the home place after the hogs and it was mutually agreed, over the phone, between Dowd and the Sheriff and myself that the proceeds of the sale should be applied to the note.

Q. What did you get for the hogs sold to Mr. Morgan?

A. I don't know. I have never seen the return of the sale of the hogs.

Q. Has the Sheriff or Mr. Dowd at this hearing accounted for the proceeds of these hogs sold to Mr. Morgan at private sale? A. No, sir.

Q. You may state whether or not, while in Mr. O'Neill's office and after you had reached an agreement on the plan for the payment of the note to the Bank of Nez Perce and all the costs, if you wrote the Bank of Nez Perce's Exhibit 19, a letter dated July 10th, 1908. A. I did. [31]

Exhibit 19 [Letter, Dated July 10, 1908, Mrs. Sarah Pindel to D. V. Dowd].

On letter-head of E. O'Neill.

Ex. L. for Id.

July 10th, 1908.

Well Mr. D. V. Dowd:

I saw Mr. Harry Lydon today and told him the hogs you had attached was in need of feed and I thought best to have them sold to save feed Bills on them and if you are willing to sell them at a fair price and give me credit on the note do so, also you can have the 200 hundred acres of crop if we can agree on the price of the crop also some of the

teams the small teams, Wiley Wagner wants a team, probably Johney Klaus would give you a good price for the crop I will pay as far as I can, I think probably we can sell enough to settle the account in full I want the hacks and buggy sold and the two year old stallion and all of the small teams and now is the time to sell just before harvest.

MRS. SARAH PINDEL.

Good by

Do the best you can.

Exhibit Nineteen, Bank of Nez Perce, G. Orr McMinimy, Referee. [32]

366

Testimony of Mr. O'Neill.

On the day that Bank of Nez Perce's exhibit marked "Exhibit 19, Bank of Nez Perce, G. Orr McMinimy, Referee," being a letter dated July 10, 1908, Mrs. Pindel came to my office at Lewiston. We talked pleasantly together, the conversation being with reference to her settling the claim of the Bank of Nez Perce. After she had told me about the matters essentially as set forth in the letter I suggested to her that we call up Mr. Dowd and talk with him. At that time my office consisted of a room in front of the building, a room in the rear of the building and a smaller closed room between, in which was the phone and secluded from the other two rooms. My remembrance of the conversation with Mr. Dowd is I called him over the phone telling him Mrs. Pindel was there at my office and wanted to or

(Testimony of Mr. O'Neill.)

would talk with him about the claim of the Bank now involved in suit against her and delivered the phone to her. I think I passed to the rear office room leaving the door open and sat down instead of standing up in that little room while she was talking. After she had talked with Mr. Dowd about as set forth in this letter I suggested to her that she put that in writing so that it could be referred to and known afterwards what her proposition was. She thought it a good proposition. I furnished her pen and ink and paper, a bunch of my own letter-heads, as I now remember, and she wrote the letter and I think she mailed it, as I asked Mr. Dowd over the phone if he received a letter of that date and he said that I think that he had, and I had previously told him that she had written down her statements about as she talked over the phone in such a letter. When Mrs. Pindel went away she was still pleasant. I think nothing was said that could occasion any unpleasantness at that time, nothing was said about the homestead or giving her any sum of money as her homestead exemption. I would have remembered it if there had been. I had noted the old homestead filing of record and had not taken up any question up to that time in the case relative to the homestead. I talked with Harry Lydon afterwards and he stated his conversation with her on that day.

[33]

65.

Testimony of Mr. Pindel.

Q. Mr. Pindel, calling your attention to the following words in schedule A3 No. 1, being the same sheet of your schedule about which Mr. O'Neill inquired in his last question to you upon examination in chief and being the same schedule about which I have inquired in all my questions, to wit, "The debt due to each creditor must be stated in full and any claim by way of setoff stated in the schedule of property," and this sheet being only a schedule of the claims of creditors who are unsecured, you did not intend upon this *sheet make* any statement whatever of setoffs against the real true judgment of the Bank of Nez Perce. A. No.

Q. Now, noted upon this schedule A3 No. blank in the original petition and No. schedule A3 No. 1 in trustee's petition, I call your special attention to the fact that setoff counterclaim against this judgment. Bank of Nez Perce, should be entered under the schedule of the Bankrupt's property. Now you may state if at the time you made up this original schedule of the indebtedness and assets of the estate if you discussed the question of scheduling under the proper schedule with your then attorney the setoff against this judgment and what was his advice to you with reference thereto, and state the reason you didn't schedule in the schedule of property the setoffs against this judgment.

A. It was discussed and my attorney advised me, J. S. McDonald, that that would be an after con-

(Testimony of Mr. Pindel.)

sideration and that would be done later, and for that reason I went no farther with it at that time.

Mr. Tweedy *wish* to have Bankrupt's Answer to the claim of the Bank of Nez Perce marked Exhibit 7 for identification, G. Orr McMinimy, Referee, and ask the witness if that is your statement of the claim in favor of the estate against the judgment of the Bank of Nez Perce and whether you now offer the same as an amendment to your original schedule in the bankruptcy. A. Yes.

The bankrupt now offers in evidence Bankrupt's Exhibit 7 for identification, G. Orr McMinimy, Referee, as his amendment to his original schedule and as a part of his cross-examination.

Admitted in evidence. [34]

215.

Q. You may state whether or not in Feby., 1909, on or about the 15th or immediately before when the case was tried in the State court, if Mrs Pindel was at Boise assisting you in procuring your pardon.

A. Yes, sir, she was *staid* there until I procured my pardon and I came home with her.

Q. After you returned home and how soon after did you go and see Mr. Dowd, the cashier of the Bank of Nez Perce, if you did?

A. Not later than the second day.

A. Not later than the second day.

Q. Where and what was the conversation you had with Mr. Dowd and state what was said by yourself and by him?

A. The conversation was in Mr. Dowd's private office, in the Bank of Nez Perce, and I asked him

what his idea was for protesting against my pardon, and he said it was the advice of his attorney, he thought he would make the old woman dig up. He knew it wasn't right but that was the advice of his attorney, Mr. O'Neill, and I asked him what they had done with the property that he had written to me that they had attached, and he said he didn't know where it was or anything about it, and I said to him, "Now, Mr. Dowd, you get in and be a man and I will show you that I am a man," and he said he could do nothing, everything was left to his attorney. **[35]**

224.

Q. Do you know a man by the name of Orville M. Collins? A. Yes, sir, I do.

Q. Is he an officer of the Bank of Nez Perce? If you know, state what official position he holds, and for about how long he has held that.

A. Yes, sir, he is an officer; he is the president; he has held it from about 1905 and he holds it yet, as far as I know of, and is practically the owner of the bank.

Q. Is he the same man who purchased or pretended to purchase your homestead on the 5th of April, 1913, at the *truess* sale of the homestead?

A. Yes, sir, he is the same man.

Q. Did you ever see Mr. Collins in regard to settling or adjusting of the claim of the Bank of Nez Perce? If so when, and state what was said by himself and yourself in regard to the claim of the Bank of Nez Perce and your claim by reason of the proceedings in the State court in the case of Bank of Nez Perce against yourself and your wife, and the

(Testimony of Mr. Pindel.)

acts of the trustee in unlawfully and illegally seizing the property of your wife, and what statement, if any, did he make in regard thereto, stating the time, the place and who was present.

A. Yes, sir, I saw him and I talked to him some time in February, 1913, at Mr. Collins' own place in Nez Perce County, Idaho, 3 miles south of Genessee, and I asked Mr. Collins to account or settle for the property which he had taken from me in my absence and straighten matters in the State court and the Bankrupt Court, and settle up with me and stop proceedings, telling him that he had got the property individually. The property was not sold. He had it in his own possession as far as I knew. He acknowledged that he had the property and as far as the law proceedings was concerned he had left that to his attorney, Mr. O'Neill, and he had nothing to do with the management, and as far as his judgment was concerned, he had put that up as collateral to the people *whom* was carrying him and he was powerless as to settling matters, he had nothing to settle with except what the bank would allow him and that was but very little. There was no one present but him and I. [36]

455.

[Bankrupt's Exhibit 2—Letter (Unsigned) Dated March 21, 1913, to N. J. Holgate.]

Boise, Idaho, March 21, 1913.

Mr. N. J. Holgate,
Culdesac, Idaho.

Dear Sir:

I have your letter of March 16th, making inquiry concerning some phases of the Pindel bankruptcy proceedings, and in reply I have to say that I could not with propriety advise you upon the subject. As Judge of the court, I shall of course, at all times be very willing to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

I would think that if the Pindels would follow the direction of some competent attorney some plan could be devised which would bring about the end sought to be reached as suggested in your letter.

Yours truly.

"Bankrupt's Exhibit Two" for Identification. G. Orr McMinimy, Referee. Introduced in evidence by Bankrupt. G. Orr McMinimy, Referee. [37]

In the United States District Court for the District of Idaho, Central Division.

In the Matter of FRANK M. PINDEL,

A Bankrupt.

Praecipe for Transcript.

PRAECIPE FOR CERTIFIED RECORD FOR REVIEW UNDER SECTION 24b, BANKRUPTCY ACT.

To the Clerk of the United States District Court, District of Idaho.

The bankrupt, Frank M. Pindel, requests you to certify to the Clerk of the United States Circuit Court of Appeals at San Francisco, California, the following matters, to wit:

The decisions and orders of the Honorable District Judge in the matter of allowing the claim of the Bank of Nez Perce, and affirming the sale of real estate, giving 35 days for redemption, and reversing the orders of the Honorable Referee; also the decision, findings of fact, the opinion and orders of the Referee, G. Orr McMinimy; also the following testimony of Mrs. Pindel, omitting objections of counsel and rulings of Referee, commencing with the third question on page 268 of transcript, the remainder on that page and all on page 269 down to and including the answer "I did," being the third answer; also Bank of Nez Perce's Exhibit 19, mentioned by Referee in his statement of facts; testimony of Mr. O'Neill on page 366 and down to and including the word "day" in the 21st line on page 367; omitting objections and

rulings, the testimony of Frank M. Pindel, and commencing with the last question on page 65 and all on page 66, ending with and including the words on page 67, "Admitted in evidence"; commencing with the last question on page 215 and down to and including the answer to the second question on page 216, commencing with the last question on page 224 and down to the first question on page 226, omitting objections and rulings; also Bankrupt's Exhibit 2, page 456, Trans.

FRANK M. PINDEL,
By BEN F. TWEEDY, and
BEN F. TWEEDY,
Attorney for the Bankrupt.

[Endorsed]: Filed June 18, 1914. A. L. Richardson, Clerk. [38]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Idaho, Central Division.

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing copies of the Decisions and orders of the Honorable District Judge in the matter of allowing the claim of the Bank of Nez Perce, and affirming the sale of real estate, giving 35 days

for redemption, and reversing the orders of the Honorable Referee; also the decision, finding of fact, the opinion and orders of the Referee, G. Orr McMinimy; also the following testimony of Mrs. Pindel, omitting objections of counsel and rulings of Referee, commencing with the third question on page 268 of transcript, the remainder on that page, and all on page 269 down to and including the answer "I did," being the third answer; also Bank of Nez Perce's Exhibit 19, mentioned by Referee in his statement of facts; testimony of Mr. O'Neill on page 366 and down to and including the word "day" in the 21st line on page 367; omitting objections and rulings, the testimony of Frank M. Pindel and commencing with the last question on page 65 and all on page 66 ending with and including the words on page 67, "Admitted in evidence," commencing with the last question on page 215 and down to and including the answer to the second question on page 216, commencing with the last question on page 224 and down to the first question on page 226, omitting objections and rulings; also Bankrupt's Exhibit 2, page 455, transcript, Praecipe for certified transcript to United States Circuit Court of Appeals, and Clerk's Certificate,—have been by me compared with the originals and that it is a correct transcript therefrom and of the whole of such originals as the same appears of record and on file at my office and in my custody. [39]

I further certify that the cost of the record herein amounts to the sum of $24.70 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 20th day of June, 1914.

[Seal] A. L. RICHARDSON,
Clerk. [40]

[Endorsed]: No. 2439. United States Circuit Court of Appeals for the Ninth Circuit. Frank M. Pindel, Petitioner, vs. Norman J. Holgate, as Trustee in Bankruptcy of the Estate of Frank M. Pindel, Bankrupt, and the Bank of Nez Perce, Respondents. In the Matter of Frank M. Pindel, Bankrupt. Petition for Revision and Transcript of Record in Support Thereof Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, Certain Orders of the United States District Court for the Central District of Idaho.

Filed June 30, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer.
Deputy Clerk.